SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 62.

ABRAHAM WOLFF, PLAINTIFF IN ERROR,

v.

THE DISTRICT OF COLUMBIA.

# BRIEF FOR DISTRICT OF COLUMBIA.

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## BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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### STATEMENT OF THE CASE.

The cause of action alleged in this case is set forth in an amended declaration (Record, pages 3 and 4), which avers the existence of the defendant in error as a municipal body corporate and its duty to keep the sidewalks within the District of Columbia free from obstruction, nuisance, or incumbrance, and particularly C street northwest, in the city of Washington, safe for travel of all wayfarers, including the plaintiff. The breach of duty of the defendant averred is that defendant wrongfully and negligently allowed "a certain large stone, several inches in height above the surface of the sidewalk, *usually termed a carriage step*," "to incumber and impede that part of said sidewalk which was oppo-

site and in front of a certain house, to wit, known as Saengerbund hall, between Third and Four-and-a-half streets, on C street northwest," during the night-time of the 27th day of October, 1895, while said street was enveloped in darkness, without fixing any light or signal at or near said stone, and without placing any watchman or other person to warn plaintiff of its existence, position, and location, and without placing any guard or screen around said stone, by means of which the plaintiff stumbled and tripped against and fell over said stone and was injured without any neglect on his part, to the damage of the plaintiff in the sum of $25,000.

To this *narr.* the general issue was pleaded, and the cause proceeded to trial under the evidence contained in the bill of exceptions. It would seem from this declaration that the pleader supposed that it was the duty of the defendant to keep the sidewalks mentioned absolutely safe. The location and size of the stone is omitted, and the pleader concludes or assumes that the law required lights about, watchmen near, or guards around this stone.

These matters were put in issue and disposed of by affirmative proof of legality in size and location of this carriage step and the consequent absence, therefore, of any duty to light or guard it.

The Saengerbund hall consisted of premises No. 314 C street northwest, in the city of Washington, at the time of the trial and at the time of the plaintiff's injury.

Daniel Murphy purchased premises No. 314 C street northwest, and moved there in the fall of 1875, and there resided until his death, about 1894 or, possibly, 1895 (testimony of Edward V. Murphy, Record, page 27).

The same witness testified that Daniel Murphy died since

1896, and that "the carriage step mentioned was in front of the premises and has been in front of the premises ever since witness can remember and long before his brother took possession of that house; and that it is his impression that it was put there when the house was built, and that the stone remained there down to the time of the death of Daniel Murphy; that it was a brown-stone step something like two feet long, possibly one foot wide or a little more than that. *That the stone in front of the adjoining premises and the stone that was spoken of are precisely the same*" (Record, middle of page 27).

The adjoining premises spoken of is house No. 312 C street northwest, and a new cement sidewalk had been laid in front of No. 314 C street about two years previous to the trial, and the carriage step in question was then given away by the Saengerbund Society and removed. (See testimony of Adolf Levy, Record, top of page 29; Frank Claudy, bottom of page 29.) Uncontradicted evidence was given which showed that the carriage step in front of premises No. 312 was identical with the step in question.

Adolf Levy says, "*the carriage step in front of 312 C street is identically the same*" (Record, top of page 29).

The measurement of the carriage step remaining in front of premises 312 C street showed that its dimensions are $29\frac{3}{8}$ inches long, $13\frac{3}{4}$ inches wide, and with a rise from the sidewalk of $7\frac{1}{4}$ inches, which under the evidence thus established the same dimensions for the carriage step in question.

While the plaintiff was testifying (Record, middle of page 16) certain photographs showing the actual location and appearance of both mentioned carriage steps and demonstrating that both of said carriage steps, prior to the plaintiff's

accident and during the occupation of the premises No. 314 C street northwest by the Saengerbund Society, were located outside of the traveled way, at the proper place on the sidewalk, next to the curb line, immediately in front of the main entrances to the two buildings. The Record (page 16) states:

"On recross-examination certain photographs were shown by counsel for defendant to counsel for plaintiff, and thereupon counsel for plaintiff said: I will consent that those pictures shall go in evidence. One of said pictures, being a photograph of the Saengerbund house, was shown to the witness who testified that he recollected seeing the building, except that he did not recollect the decorations thereon which were shown in the photograph, and that the building looks that way outside of the decorations. Counsel for plaintiff thereupon admitted that the photograph shown was the photograph of the building and that it showed the carriage step; and thereupon, witness continuing, said: On the occasion of the injury it seemed to me as though it (carriage step) was almost in the center of the building. The photograph, showing carriage step and building, was exhibited to the jury."

This photograph was exhibited to Mrs. Wolff, a witness for the plaintiff, and she testified (Record, middle of page 18) "that the position of the carriage step on that night (the night of said accident) is the same as shown in the picture."

There is not, it will be observed, any claim that under the evidence in this case the particular carriage step over which the plaintiff fell was improperly or unusually located, nor that it was of size or dimensions contrary to the regulations. The plaintiff offered no evidence on these questions, and the evidence of the defendant established the fact of

proper location, size, and dimensions. Neither had there been any "change in the steps of the Saengerbund" since 1893, nor in "the said carriage step" until its removal by this society after the plaintiff's accident, as before noted. (See testimony of Adolf Levy, Record, bottom of page 28 and top of page 29; testimony of Frank Claudy, Record, bottom of page 29; John Waldman, George Smith, and George H. Kolb, Record, middle of page 30.)

The accident occurred on Sunday, October 27, 1895 (Record, top of page 7), according to the plaintiff, "around nine o'clock" in the evening. "*The stars were shining and I knew it was a very bright night.*" "*It was a bright moonlight night*" (testimony of plaintiff, cross-examination, middle of page 10 and top of page 14), and "the night was clear" (testimony of Mrs. Francis Wolff, Record, top of page 17). Mrs. Wolff also testified that the plaintiff and party left the country place of Mr. Borchardine in a light grocer's wagon, between seven and eight o'clock, and arrived at the place of the accident in "about an hour or little more" (Record, bottom of page 16).

The remaining evidence on the light question is addressed to the lighted condition of the street—in which the location and condition of the foliage of the trees there, the position of the street lamps, and the lights from the Saengerbund premises is described.

The absence or presence of light or no light made no impression whatever on the plaintiff, and the reasons for his lack of knowledge and carelessness of inspection will be disclosed when the cause of his injury is considered. The plaintiff testified (Record, middle of page 8):

"*I could not say whether there was any light there or not.* I could not say whether there were any lamps there or not; but it was dark, I know that; *coming out of the light house it was dark naturally.* There was no light whatever. The trees were in full bloom at the time and covered almost from one side of the street to the other and the first time I ever saw that stone was after I fell over it."

The plaintiff further testified that "there was no light in the *vestibule* (of the Saengerbund premises) that night, but *there was a light in the hall, on the inside*" (Record, bottom of page 9); that he "did not see any lamp on the other side of the street," "*for I never looked there*" (Record, middle of page 10). "There was a light inside the building, in the center of the ceiling, I suppose. I could not tell you where it was exactly. There was a light, I know that" (plaintiff's testimony, Record, near bottom of page 10). The plaintiff also testified that "the carriage step was right in the line where I came down the steps, and right straight out" (Record, just above the middle of page 13). The plaintiff also testified: "*Certainly, if I was standing on the sidewalk and looked, I think I could have seen it* (the carriage step) *if I had looked down*" (Record, middle of page 15). The plaintiff does not testify that there was any obstruction which prevented him from seeing the carriage step, and as he knows nothing about the outside lights, because he did not notice them and was not looking for them, the evidence on this point must be gathered from other witnesses.

C street northwest at the place of the accident is a comparatively narrow street. Mrs. Wolff, the plaintiff's witness, who sat in the wagon waiting for Mr. Borchardine and plaintiff, to come out of the Saengerbund, saw the stone

after the plaintiff fell over it (Record, top of page 17), and she says there was a gas lamp across the street, with trees between, and a light from the hall window of the Saengerbund (Record, top of page 17). This lighted gas lamp "across the street was to the middle of the street," says Mrs. Wolff (Record, middle of page 17). She saw this light illuminating the roadway and testified: "*I could see very plain where he had fallen after he fell.*" "You could see the leaves on the middle of the street from the reflection of the light, and the wagon was *a little distance* from the stone when they came out;" "about two feet from the carriage stone parallel with the sidewalk" (Record, middle of page 17).

This way so lighted by the gas lamp across the street was interrupted, under the evidence, by the trees there from the *inference* only of this witness, because she says, "I guess it was behind the trees" (Record, middle of page 19).

It appears that when the party in the wagon stopped in front of this hall it was for the purpose of affording the plaintiff and his friend Borchardine an opportunity to drink some beer and to get cigars. The accident occurred after the drinks and cigars had been procured and the plaintiff was hastening ahead of Borchardine to reach the wagon.

Borchardine was a member of the Saengerbund and says that the Society moved into premises 314 C street in 1892 or 1893, and that he "saw that stone every day when we went to rehearsal" (Record, bottom of page 20). He testified in the plaintiff's behalf and established that there was an additional light on the same side of the street, "near the alley." Respecting the position of the stone, considered with reference to the stairway of the hall, he testified, "the stone

was lying right about the middle of the stairway" (Record, middle of page 21).

The driver of the wagon was one G. A. Seegar, who, while Borchardine and plaintiff were inside the building, paced the sidewalk, sometimes being within six feet of the carriage step and sometimes 10 or 15 feet away from it (Record, bottom of page 24). He saw the carriage step when at the foot of the steps of the Saengerbund hall, the width of the pavement being between (Record, top of page 25).

He also testified that "there was a light inside the Saengerbund, inside the hall, which shone through the glass door," and he says there was a lamp on the other side of the street, "catercornered" (Record, middle of page 25).

The plaintiff also established by the evidence of Amelia Borchardine that there was a lamp on the corner of the alley, on the same side of the street, in 1895, but she fixes no particular time (Record, middle of page 25).

Some of the plaintiff's witnesses said in general terms that they did not know whether there was a tree in front of these premises or not at the time of the accident. The purpose of this inquiry was to establish that a tree existing there at the time of the trial was there at the time of the accident, and to claim that it in a measure obstructed the light from the lamp on the same side of the street.

This tree is spoken of as a "little tree" (Burns, Record, bottom of page 27), 2 inches to 1½ inches in diameter (Record, top of page 28), and was planted about a year or the spring before the trial, which occurred in January, 1902 (Kanhan, Record, top of page 28).

The nearest tree on the side of C street where the accident occurred was about twelve feet distant from the center of

the steps of the Saengerbund (Record, bottom of page 27), and did not obstruct a clear view of the carriage step.

It was, moreover, abundantly established by uncontradicted evidence that at the time of the accident (Record, page 29) the steps and sidewalk there were lighted by a large lantern in the vestibule, a light in the hallway, and other lamps in the house, which made the steps and pavement in front of this club-house "as bright as a moonlight night." Indeed, Sunday night was and is the night on which this club-house was most patronized, and "every Sunday evening" it was the practice "to light up everything that was 'lightable'" (Claudy, Record, bottom of page 29), and "when all the lights are lit it is absolutely impossible not to see that stone when you are on the top of the steps or coming down" them (Claudy, Record, top of page 30). If there could be any liability because of a deficiency of light on this street, the evidence on behalf of both parties failed to establish a want of it.

The evidence in part above recited, we respectfully submit, conclusively establishes that this sidewalk was reasonably safe for pedestrians.

That the plaintiff was guilty of gross negligence, which contributed directly to his injury and was the proximate cause of it, is established by many facts, prominent among which are the speed with which the defendant descended the Saengerbund steps, his frantic rush across the pavement from the building line to the curb line, and the violence of his fall.

There were three persons, who from three different locations witnessed the event which resulted in the plaintiff's injury.

One was Mrs. Frances Wolff, who was seated in the wagon; another was G. A. Seegar, the driver of the vehicle, who was on the sidewalk, and the third was Otto Borchardine, who was on the platform of the Saengerbund steps.

In order to ascertain what opportunity Mrs. Wolff had to see the carriage step, it is necessary to locate her position in the wagon, and the situation of the wagon with reference to the curb line, carriage step, and other surroundings.

The plaintiff testified: "The (side of the) wagon stood not quite two feet away from the stone *after I fell over it*, the horse facing towards Four-and-a-half street, and back of the wagon was away from the stone" (Record, top of page 8). The wagon blinds were down (Record, top of page 9). "The end of the wagon *when I got out* was past the entrance of the Saengerbund building, but I really could not say how far—a foot, or three feet, or how far it was" (Record, near bottom of page 9). "I got on the wheel and got off the wagon. Certainly, I stepped on the wheel and got off the wagon." Being asked which wheel he stepped on, witness says: "I was sitting in the back part of the wagon and must have stepped on the back wheel" (Record, bottom of page 9 and top of page 10).

"The shades were down, certainly; they just hung down there, and you lifted them up and got out. I lifted the shades, certainly" (Record, top of page 10).

Mrs. Wolff differs from the plaintiff in several particulars. She testified he got out of *the back of the wagon* (Record, bottom of page 16), and testified that wagon stood parallel to the sidewalk, with the horse facing towards Third street, when plaintiff came out of the hall (Record, top of page 17). "When we got to Saengerbund hall that night," witness says,

"I cannot tell how the team was facing" (Record, top of page 18). "After plaintiff and Mr. Borchardine got out of the wagon it moved a little towards the end; it made it straight with the sidewalk" (Record, top of page 18).

This "witness faced the tail end of the wagon, and the back of the wagon was a little distance from the stone, parallel to the sidewalk, about two feet. *The wagon did not turn around*, did not go any distance away, just straightened out." "Witness could not see through the curtains in the wagon. *Witness was on the side of the wagon facing Saengerbund hall, the last seat of the wagon.*" This witness said on direct examination that she "*could not see the steps of the Saengerbund hall from where she was sitting, (but) could see up the steps:* (that) the wagon was not slanting, but the witness was sitting slanting," and that she did not see the carriage step before the plaintiff fell over it (Record, top of page 17). We therefore understand that the steps leading in and out of this hall and the carriage step were not within the line of Mrs. Wolff's vision, but that the hall entrance was. She was in a darkened wagon, with her range of vision diverted both from the entrance steps mentioned and the carriage step, and her conclusions whether the plaintiff or any other pedestrian had sufficient light to see the carriage step are of no value; but when she looked towards the carriage step, which she did after the plaintiff fell, she saw it (Record, top of page 17).

It is not surprising, then, to find from the testimony of Otto Borchardine that the plaintiff (if plaintiff's testimony is to be the guide) must have placed his foot on or in immediate proximity to the carriage step when he got out of the wagon, and to find that he located the carriage step at that time, where it undoubtedly was, between the wheels of the

wagon. He says, "the stone was right in between the two wheels" (Record, middle of page 20).

Borchardine says when plaintiff and himself got out of the wagon the wheels of the wagon were "right on the curb, snug against the curb" (Record, near bottom of page 21). Nor could the wagon have moved to any considerable extent, because Borchardine testified that when the plaintiff fell "the end of the wheel was right at the carriage stone, one end of the carriage stone" (Record, bottom of page 22). This witness further testified that when he "came out of the Saengerbund the horse remained with his head to Third street" (Record, top of page 22).

G. A. Seegar, who was the driver of the wagon and in charge of it, and who therefore knew whether he turned it around, as the plaintiff had testified, says that it was not turned around.

"Q. Did your wagon move after you stopped until Mr. Wolff came out? A. I don't know, sir; it may have moved a few inches. You know just how a horse is—sometimes he takes a step ahead or a step back. I did not have to move him to get the wagon into a better position, so that the wagon was in about the same position when Mr. Wolff and Mr. Borchardine came out as it was when they went in. My wagon was right close up to the curb, not further away than an inch or two, and when I drove up to the Saengerbund I drove into the line of the curb, so as to get as near as possible" (Record, top of page 24).

This witness further testified that the end of the wagon was near the carriage step; "that the carriage step was covered a little ways with the hind wheel," perhaps half way or one-third of the way, and he "found that out later,

because (he says) I stepped down from the wagon and walked around the pavement and saw it" (Record, middle of page 24). It also appeared from Seegar's testimony that the horse faced east (Record, top of page 24). The result of this testimony is to bring this witness nearly in accord with Borchardine, and to establish that the wagon covered the carriage step more or less. It also shows that the carriage step could not have been within the line of Mrs. Wolff's vision.

Now Borchardine had previous knowledge of the existence of the carriage step. He "*had noticed the stone many times before the accident*, but did not take any notice of the stone that night" (Record, bottom of page 20). Such notice that night was, of course, unnecessary to him.

Therefore the absence of notice of the carriage step prior to the accident to both Mrs. Wolff and Borchardine was the result of other causes than the want of sufficient light about or upon it. On this point of sufficient light their evidence is immaterial. G. A. Seegar was, however, in the position of a pedestrian, and he saw the carriage step while walking along the pavement, and it did not obstruct his reasonable and free use of the sidewalk.

We quote from Seegar's testimony (Record, bottom of page 24 and top of page 25):

"Q. While you were walking up and down the sidewalk, did you see this carriage step? A. Yes, sir.

"Q. How far were you away from the carriage step while you were walking up and down the sidewalk? A. Different distances; sometimes six feet, sometimes maybe 10 or 15 feet. Witness says that when he was ten or fifteen feet away he could not see the carriage step, nor when he was 6 feet away could he see it.

"Q. Then when did you see it? A. When I was near it.

"Q. What do you mean by near it? A. When I go close to the step.

"Q. What do you mean by close to the step? A. To the Saengerbund steps.

"Q. What do you mean by being close to the steps—do you mean at the foot of the steps? A. Yes.

"Q. When you were at the foot of the steps and would turn around and look, could you see the carriage step? A. Yes, sir.

"Q. How far is the foot of those steps from the carriage step? It is the width of the pavement, is it not? A. Pretty near it."

Recurring now to the plaintiff's evidence, it is apparent, we submit, that had he looked for the usual curb-line accessories he would have seen the carriage step.

We briefly review his evidence from the time he started on his return to the wagon from Saengerbund hall.

First, he saw the wagon (Record, bottom of page 10 and near top of page 11): "Certainly I saw the wagon" (Record, top of page 13), and "the carriage step was right in the line where I came down the steps and right straight out" (Record, near top of page 13); but he did not see it (Record, bottom of page 13). "I said the stone was brown because I heard that afterwards; of course I don't know. After I was laid up in bed somebody came in and told me" (Record, bottom of page 13 and top of page 14).

Second, he knew there was a gutter there (Record, top of page 16); and, third, he says: "*I could see the middle of the street*" (Record, top of page 16).

The plaintiff's evidence discloses that while approaching

this gutter and curb-line he did not look for any of the usual things to be found there.

The plaintiff testified (Record, page 15):

"Q. If you had looked when you came down the steps, you could have seen the carriage step, could you not? A. Not if I looked ahead of myself. Not if I looked straight out.

"Q. Were you intending to fly or to walk? A. No sir, it was dark, I could not see that step.

"Q. If you had looked in the direction in which you intended to walk, could you not have seen the carriage step? A. In the direction? No sir, I do not think I could.

"Q. Why not? A. Because it was dark. *Certainly, if I was standing on the sidewalk and looked, I think I could have seen it if I had looked down.*

"Q. Exactly. When you reached the sidewalk after you had left the steps? A. Yes sir.

"Q. If you had looked in the direction in which you were going, could you have seen the carriage step? A. No, sir; I did look in the direction in which I was going, but *I was looking right out before me.*

"Q. What were you looking at? A. I was looking where I was walking.

"Q. How were you walking, on the ground? A. What?

"Q. *If you were looking where you were walking you ought to have been looking on the ground? A. No sir.*

"Q. What were you looking at? A. *I was looking right straight ahead, not with my head down.*

"Q. *Right straight ahead?* A. *Yes sir.*

"Q. *At what object?* A. *Not at any particular object at all.*

"Q. You were going to the curbstone, were you not? A. Yes sir; going to walk out into the street to get around and get into the wagon.

"Q. And you intended to go into the roadway and get into the wagon? A. Into the wagon, yes sir."

The rapid pace of the plaintiff and the great violence with which he fell shows his disregard of every ordinary precaution. The evidence on this subject is clear and free from dispute.

The plaintiff says (Record, page 10):

"Q. How was it that you went ahead of Mr. Borchardine? You came out first? A. *I wanted to get down in the wagon first.* I wanted to give him a chance to get in the wagon, and I was going out in the street to get around the wagon to get in on the other side of the wagon so as to waste no time.

"Q. So that you were hurrying to get down to the wagon first? A. Not exactly hurrying. *I wanted to get down in the street and get in the wagon, so that I walked fast downstairs naturally,* and I wanted to get home.

"Q. You walked fast down the stairs? A. *Came fast down the stairs.*

"Q. You say you hastened down to get around and give Mr. Borchardine a chance, didn't you? A. Yes, sir, to get around the wagon."

Record, middle of page 11.

"Q. You were hastening along to get to the wagon? A. Not exactly hastening, I was going in a hurry.

"Q. In a hurry? A. Yes, sir, not hastening."

Record, near bottom of page 12.

"Q. Isn't it a fact that you were hastening—running? A. I was not *exactly* running; I was walking fast.

"Q. Trotting? A. No, sir; not trotting, just walking fast."

Record, near bottom of page 13.

When he fell over the carriage step, he says, his body went "right into the street. Right out into the *middle* of

the street" (Record, middle of page 14), and he did not pull himself out into the street.

Mrs. Wolff testified that when the plaintiff came out of the hall "he came down the stairs and fell over a stone and *flew right in the middle of the street*" (Record, bottom of page 16).

This "witness saw plaintiff come down the steps of Saengerbund hall. Plaintiff came out first and Mr. Borchardine came back of him. The plaintiff *came down quickly*, like any man would come down the stairs, and struck the carriage step, walked right straight out and *flew into the middle of the street, about three or four feet from the curb. He fell over the stone and flew right out into the middle of the street, clear into the roadway.* When the plaintiff fell Mr. Borchardine was on the Saengerbund steps" (Record, middle of page 18).

"Q. You saw him fly through the air? A. Yes sir, *I saw him fly.*

"Q. Did he make a clean sweep? A. *He did not touch anything else before he fell.*

"Q. Then he simply struck the carriage step and flew right out into the middle of the street; is that right? A. That is as much as I can remember, yes.

"Q. *He did not strike the carriage step and fall right over into the gutter?* A. *No, sir.*"

Being asked with what speed plaintiff came down the steps, witness says he came down quickly. "That is the only way I can explain myself."

"Q. What do you mean by saying 'quickly'? A. What I said before, the same as I meant it then, like any man would come down the steps. They don't walk slowly.

"Q. Did he walk slowly across the pavement? A. I don't know how he walked across the pavement; I don't know about the pavement. I seen him come down and *saw him fly from the carriage step into the street*, that is all I know" (Record, middle of page 19).

Otto Borchardine and plaintiff came out of the Saengerbund building together, and while Borchardine turned to close the door the plaintiff descended the steps, crossed the pavement, and fell over the carriage step.

Borchardine testified (Record, bottom of page 21 and top of page 22):

"Q. Where did you stand when he was going down the steps? A. I was on the platform because I shut the door and I was the last one and *I was just about at the platform, on top, when I saw Mr. Abe Wolff roll over the stone.* (Photograph of the premises shown witness and then exhibited to jury,) and witness indicates where he was standing, saying: I was there with intent to go down the stairway. *I was not standing, I intended to go down the stairway and at that same moment I saw Mr. Abe Wolff fall. I was about to go down the stairway.*

"Q. Where was he when you saw him? A. He fell right over the carriage step.

"Q. Had he struck it when you saw him? A. *The only thing I saw was his whole body fly right over.*

"Q. *He was flying over when you started to go down?* A. *Yes.*

"Q. Did you see him going down the steps? A. Yes.

"Q. *How was he going?* A. *Right fast.*

"Q. Was he walking or running? A. You cannot run down the steps.

"Q. If anybody can run down the steps, was he running? If it is possible? A. You cannot run down; he was only going right fast.

"Q. It does not make any difference how fast a person comes down the steps, you would still call it not running? A. Not running."

G. A. SEEGAR testified that he (Record, middle of page 24) saw plaintiff strike the stone and fall over it, and went to his assistance.

"Q. How far did he fall? A. *I think he fell almost the distance of the wagon.*

"Q. Did he fall past the wagon? A. I think he did. If the wagon had backed I think it would have run over his back, and both of the wheels would have run over him. When the plaintiff came down the steps I was standing in front of the horse. I suppose I was taking care of my horse, and I stepped out of the wagon to take a walk along the sidewalk. I was near the head of my horse when the plaintiff came down the steps."

## ARGUMENT.

### I.

**The duty of the municipality to keep the sidewalks reasonably safe for pedestrians was not violated by permitting the stepping stone or carriage block over which the plaintiff in error stumbled to remain on the sidewalk, considering the size and location thereof, custom and usage and the building regulations in force in the city of Washington. Such stone was a legal structure and was not an unlawful obstruction of the sidewalk, nor was it a nuisance, and therefore judgment was properly rendered in favor of the defendant in error.**

There was no evidence in this case that the stepping stone or carriage block was within the traveled way.

The evidence on the contrary was that it was without the traveled way.

Neither was there any evidence that such stone was of unusual dimensions.

The evidence was that it was identical with a stone which was within the dimensions prescribed by the building and police regulations in force prior to and at the time of the accident, and there was no defect or peculiarity in the stone which caused the injury of which complaint is made.

Reference to the building and police regulations discloses the following :

January 1, 1877, Building Regulations, page 23, section 23:

"Carriage steps shall not exceed in dimensions three and one-half feet by twenty inches (nothing said about height)."

June 3, 1882, Building Regulations, page 23, section 23:

"Carriage steps shall not exceed in dimensions three and one-half feet by twenty inches (nothing said about height)."

November 1, 1899, Building Regulations, page 24, section 4:

"Carriage steps when authorized shall not exceed in dimensions three and a half feet by twenty inches nor eight inches in height."

June 26, 1891, Building Regulations, page 27, section 11:

"No hitching post, carriage block or other obstruction shall be erected except on a permit issued by the inspector of buildings."

December 1, 1892, Building Regulations, page 28, section 10:

"No hitching post, carriage block, or other obstruction shall be erected except on a permit issued by the inspector of buildings."

May 2, 1894, Building Regulations, page 31, section 10:

"No hitching post, carriage block or other obstruction shall be erected except on a permit issued by the inspector of buildings."

August 8, 1892, Police Regulations, article VIII, section 3, page 14:

"No carriage step shall be erected or located beyond the building line unless a permit therefor shall first have been obtained from the inspector of buildings."

March 12, 1895, Police Regulations, page 23:

"Carriage blocks shall not exceed in dimensions thirty inches by fifteen inches, by eight inches in height."

Article VIII, section 10, page 38, of the present Police Regulations:

"Carriage blocks shall not exceed in dimensions thirty inches by fifteen inches, by eight inches in height, and shall not extend beyond the inner line of the curb."

Projections beyond the building line of houses have always been allowed in the city of Washington (see Webb's Digest, 65; Building Regulations, pp. 80 to 89, inclusive, act of March 3, 1891), and such projections or encroachments (if need be) on the sidewalk have been declared legal obstructions.

"In a populous town, where land is very valuable, it *is not unreasonable* to erect buildings and fences on the line of the street and *to place doors and gates* in them, *so as when opened to swing over the street.*"

O'Lind *v.* Lothrop, 21 Pick., 292–297.

"The owners of lots bordering upon streets or ways have, or may have, in other respects, a right to make *reasonable and proper use* of the street or way. What may be deemed such a use depends, in the absence of legislative or authorized municipal declaration, much upon the local situation and public usage,—that is the use which others similarly situated make of their land—this being evidence of a reasonable use.

"Conformably to these principles, it was held that common and well-established usage in the city of Boston justified the owners of land in erecting thereon warehouses, on

the line of a street or way, with *doors and windows opening upon the way or street*, and shutters projecting into the same, when open, and with sidewalks in front, having on their surface *iron gratings*, for admitting light to and *trap doors* for communicating with, the cellar or underground apartments of the warehouses, and used for putting in and taking out goods."

2 Dillon, Munic. Corp., sec. 734.

The same rule exists in this jurisdiction. In Howes *v.* District of Columbia (2 App. Cases D. C., 193), the court said:

"It is very evident to every one that these sidewalks in their entirety are not intended to be free from obstructions. Steps leading to the doors of houses, steps and areaways leading downwards to the entrance to basements, openings for the admission of light and air to basement windows, projections in the shape of bay windows and other similar constructions on the inner part of such sidewalks, are necessary and recognized obstructions to their free and unlimited use for the purpose of travel over them, and on the outer side we have *carriage steps*, hitching posts, hydrants, pumps, planted trees, over which the public may not pass in freedom. Very generally also we have now a very considerable portion of this alleged sidewalk taken away from this supposed public use by its reservation *for parking purposes*." (See Dist. of Columbia *v.* Libbey, 9 App. Cases D. C., 325.)

These building and police regulations, authorized as they were by Congress, permitted the officials of the municipality to recognize the necessity for carriage steps for the public benefit and convenience, and therefore such steps were not nuisances for injury from which this action can be sustained.

This court has declared:

"That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes."

The Northern Transportation Co. *v.* City of Chicago, 99 U. S., 635.

We find that stepping stones or carriage blocks have been elsewhere judicially determined lawful structures upon the highway.

The placing of a stepping stone of ordinary size and proper construction in a convenient place at the edge of a sidewalk in front of a public building in a city, as an accommodation to the public in alighting from and getting into vehicles, is not such an obstruction of the streets as will charge the municipal corporation with negligence for allowing it to remain, even though five other persons had been injured by falling over it.

Dubois *v.* City of Kingston, 102 N. Y., 219.

In Robert *v.* Powell, 168 N. Y., 414, the court said:

"It is quite true, as the learned counsel for the plaintiff contends, that every unlawful obstruction placed in a public street which endangers the safety of travelers may be regarded as a nuisance, but the question is what object will constitute an unlawful or dangerous obstruction. There are some objects which may be placed in or exist in a public street, such as water hydrants, hitching posts, telegraph poles, awning posts, or stepping stones, such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the street as a public highway. The hitching post, for instance, in front of a private residence, is intended, not only for the

convenience of the private individual, but for the safety of the public as well, since it is intended to guard against accidents resulting from runaway teams or horses. It is quite conceivable that a shade tree located within the boundaries of the street or highway may cause an accident or injury to a private individual using the street. But it does not follow that it constitutes a public nuisance in the highway. The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street; nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There was eight feet of clear open space upon the sidewalk for the use of travelers, and the fact that the plaintiff, while hurrying in the nighttime to take a cab, stumbled over the stone, when the place was well lighted and the object plainly visible, does not prove or tend to prove that the defendant was guilty of any wrong or breach of duty in maintaining the stepping stone in front of her house. It is true that the plaintiff was injured, but that was the result of an accident, due possibly to his own fault, but at all events not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street. The question involved in the case is, we think, well settled by authority (Dubois *v.* City of Kingston, 102 N. Y., 219; Dougherty *v.* Village of Horseheads, 159 N. Y., 154). While it is said that these cases involved only the question of liability on the part of a municipality to negligence, they also decided that the existence of objects of this character in the streets is lawful. If the city could not be held liable for permitting them to be there after notice, neither can the defendant be held liable for placing them there. The question involved in this class of cases is whether the object complained of is usual, reasonable or necessary in

the use of the street by the owner of the premises or any one else."

The statute requires of municipalities the exercise of ordinary care in the construction and maintenance of streets and sidewalks, but that duty is not violated by permitting a carriage block of the usual size to occupy the usual position of such blocks on the sidewalk, near the curb, and not upon that portion of the sidewalk which is designed for the use of pedestrians going upon or passing along the walk.

City of Cincinnati *v.* Fleischer, 63 Ohio St., 229.

A hitching post is not a defect.

Macomber *v.* City of Taunton, 100 Mass., 255.

City of Rockford *v.* Tripp, 83 Ill., 247.

A city's failure to place a fence around a water hydrant which is properly located cannot render it liable for an injury caused by a traveler driving against it. Indeed, the fence would likely be the more dangerous.

City of Vincennes *v.* Thuis, 63 N. E. Rep., 315.

Canavan *v.* City of Oil City, 183 Pa. St., 611.

A municipality has the discretionary power to locate a fire-plug on a sidewalk, and if, in the exercise of such discretion, it places a plug of ordinary diameter on a sidewalk four inches from the curb, it cannot be made liable for personal injuries to a pedestrian who stumbles over the plug.

Horner *v.* City of Philadelphia, 194 Pa. St., 542.

The argument in the court below on behalf of the plaintiff in error asserted that it was the duty of the District

authorities to see that all sidewalks were free from obstructions of every kind and character.

The citations of authority were:

"Sections 22, 225, 226, 227, 229 Revised Statutes of the District of Columbia.

"'It shall be the duty of the Chief of Engineers, in charge of the public buildings and grounds, to cause obstructions of every kind to be removed from streets, avenues and sidewalks in the city of Washington as have been or may be improved in whole or in part by the United States, and keep the same, at all times, free from obstruction' (section 226, Revised Stats.).

"'No * * * portion of the public streets or avenues in said city, shall be occupied by any private person, or for any private purposes whatever' (section 222, Rev. Stats. D. C.).

"U. S. *vs.* Cole, 18 D. C., page 504.

"Libbey *vs.* District of Columbia, 9 App. D. C., page 321.

"Curry *vs.* District of Columbia, 14 D. C. App., page 423.

"This duty imposed on the Chief of Engineers by the act of Congress cannot affect the duty also imposed on the District of Columbia as a municipal corporation, to enforce all laws, regulations, etc., and certainly, when the act of Congress says:

"'If any person shall place any obstruction on the streets, avenues, or sidewalks so improved by the United States, such person shall pay the costs of removing the same, and shall be subject to a penalty of ten dollars, to be recovered as other debts are recovered in said District, for each and every day the obstruction may remain after the Chief of Engineers shall have given notice for its removal' (sec. 229, Rev. Stats., D. C.).

"This section, taken in connection with the other sections referred to, clearly makes an obstruction of any kind unlawful. And there being an unlawful obstruction in the streets of a municipal government, of which it has knowledge, it is certainly its duty to cause same to be removed.

"Barnes *vs.* District of Columbia, 91 U. S., p. 540.

"Woodbury *vs.* District of Columbia, 136 U. S., p. 450."

We regard this argument as begging the question, which is whether the carriage block was an obstruction at all in view of the right to maintain the same at a convenient location on the sidewalk without the traveled way. If carriage steps are illegal we do not see how the city can allow the maintenance at the curb-line of the sidewalk of lamp posts, gas and electric; trees, tree boxes, hitching posts, hydrants, pumps, and fire-plugs which have been so placed and maintained at all times heretofore.

The license and allowance of such structures at convenient places, including the particular structure here inquired of, was within administrative discretion and the due exercise of police power.

For the exercise of such power by its officers in the course of their duty, even though the result was the injury to the plaintiff, we submit that no liability thereby accrued against the municipality.

## II.

**A consideration of the evidence and all the inferences which the jury could have justifiably drawn from it should result in the conclusion that the negligence of the plaintiff in error, by his failure to exercise his faculties, when approaching at an unusual speed that portion of the sidewalk devoted to obstructions, such as carriage steps and the like, contributed to his injury, even if such structures be considered nuisances and defects in the sidewalk.**

The evidence disclosed that the plaintiff in error could have seen the carriage step. But whether such be the fact or not, his approach thereto was so rapid and careless and in such manner as to disclose that he was wholly reckless and devoid of care in the use of the sidewalk. We affirm that in approaching obstructions, including such portions of the sidewalk where carriage steps and the like are located, the traveler should be on his guard is the requirement of the law.

Such is the settled law in this District.

Howes *v.* D. C., 2 App. Cases D. C., 188.

In the above case the accident occurred on a dark night while the gas lamps were lighted—a parallel of the most favorable view for the plaintiff possible in this case. Similarly the lamp-light in the house was shining through the window and plaintiff constantly kept his eyes on that light, which is in correspondence to the action of the plaintiff in the case at bar in keeping his eyes solely fastened on the

wagon in which he intended to enter. There, too, the plaintiff kept right on, *not noticing* the opening before him, and fell headforemost into it, which resembles the action of the present plaintiff in failing to notice the carriage step. Indeed, the plaintiff in the former case was more careful in that he did not act with undue haste, while this plaintiff carelessly and impetuously rushed onward and over the carriage step.

In the Howes case the court applied the rule that "the facts must be such that from them reasonable men, in the exercise of a dispassionate and impartial judgment, could draw but one conclusion," and drew the conclusion from the facts that the plaintiff was guilty of contributory negligence. The court also said:

"It is very evident to every one that these sidewalks in their entirety are not intended to be free from obstructions. Steps leading to the doors of houses, steps and areaways leading downwards to the entrance to basements, openings for the admission of light and air to basement windows, projections in the shape of bay windows and other similar constructions on the inner part of such sidewalks, are necessary and recognized obstructions to their free and unlimited use for the purpose of travel over them, and on the outer side we have *carriage steps*, hitching posts, hydrants, pumps, planted trees, over which the public may not pass in freedom."

Nor do we believe that the use on the curb-line of such a common article or thing as a carriage step was of itself, in view of the many years that carriage steps have existed in the city of Washington without resulting in known injuries to pedestrians, notice that it was necessarily hazardous or dan-

gerous. The authorities were not bound to presume it was dangerous, or that it made the traveled way unsafe for the ordinary and reasonable use of pedestrians. The sidewalks are made for ordinary travel, not for foot races; nor could the District anticipate that one would suddenly cast himself over this carriage step.

In Allis *v.* Columbian University the court instructed the jury that if the plaintiff "by means of ordinary care and prudence *could have seen said step* projecting above the sidewalk, it was incumbent upon her to use all the additional precautions on her part which a person of ordinary prudence would use, in view of the circumstances; and if she did not do so, the plaintiffs are not entitled to recover; provided, such want of care on her part occasioned or directly contributed to the accident," and the general term sustained the instruction.

Allis *v.* Columbian University, 19 D. C., 270–273.

This duty to exercise ordinary care was repeated several times in the instructions in D. C. *v.* Ashton, 14 App. Cases D. C., 576, and the doctrine announced in that case is that where a person voluntarily exposes himself to obvious danger without necessity he is guilty of negligence as a matter of law.

D. C. *v.* Ashton, 14 App. Cases D. C., 579.

In Swart *v.* D. C., 17 App. Cases D. C., 412, the court said:

"But it does not always follow that because a trench, excavation, or pile of earth may be found in a street or highway, constituting a temporary obstruction to travel thereon,

that therefore the obstruction is unlawful, and that for all injuries that may be received by those attempting to use the street in that condition the municipality will be liable. Such excavations and piles of earth in the streets may be necessary in making the ordinary improvements of the city; such as sewers, laying of water and gas pipes, and the like; and if made for such purposes, and with ordinary care, they are not unlawful obstructions of the streets. * * * To entitle the plaintiff to recover for this injury, it must be shown that the alleged negligent defect in the street, if defect were shown to exist, was the sole cause of the injury. Where the injury follows from a defect united with some distinct efficient cause, without which it would not have happened * * * the plaintiff cannot recover."

In the same case (Swart *v.* D. C.) the Chief Justice of the Court of Appeals said, at page 412:

"It is true, every one has a right to travel the street; but it is an established principle, that a party who ventures to pass a dangerous defect or obstruction in a street or highway, knowing its condition, *is bound to exercise a degree of care proportionate to the danger.*"

In Quimby *v.* Filter, 62 N. J. L., 766, the plaintiff and wife brought an action against an abutting owner for injuries sustained by the wife through falling into an opening in the sidewalk of a public street in Jersey City, from which opening a flight of steps led to the cellar of the building owned by the defendant. The accident was due in part to the absence of guards or railings around the steps, and was necessarily submitted to the jury. Mrs. Filter (one of the plaintiffs) with a Mrs. Tietjen and her young daughter were passing along the sidewalk. It was after nightfall, but the

street was well lighted, and Mrs. Filter fell to the foot of the cellar steps and was injured.

The only witnesses to the accident called for the plaintiffs were Mrs. Filter and Mrs. Tietjen. Mrs. Filter said that she did not know how she came to fall nor from what point she fell, but in a confused and uncertain way she testified that it was the north guard-rail that was gone, and that she was close to the building when she fell. There was a difference in the testimony between the parties as to the conduct of the plaintiff, for the defendant's witnesses, in contradiction of the plaintiff's witnesses, testified that the plaintiff and party were laughing and "fooling" and pushing one another, and that Mrs. Filter fell or was pushed down the steps. The judge instructed the jury that Mrs. Filter was not bound to use ordinary care as she passed along the sidewalk, unless there was some means of warning or the "pitfall" was guarded. This instruction was afterwards modified as follows: To a request to charge that if Mrs. Filter knew of the existence of the dangerous place, or if it was open and obvious to sight, she was bound to use reasonable care to avoid the danger, the judge responded by saying that if she *saw* the dangerous place she would be bound to use ordinary care to avoid the danger. He broadened this ruling by charging a request that if she *knew or saw* the dangerous place she would be guilty of contributory negligence in not avoiding it, but, in response to a request to charge that she was guilty of contributory negligence if she did not see the "cellarway," *provided she would have seen it by exercising ordinary care,* the court refused so to charge. The appellate court, in reversing the case, observed:

"It is common knowledge that adjacent to the buildings on a city street there are various appendages for their convenient use that project into the sidewalk. *It might well be that Mrs. Filter, with due circumspection measured by the standard of ordinary care, would have avoided the accident that befell her, although she did not previously see or know exactly the danger of such an accident.*"

Quimby *v.* Filter, 62 N. J. L., 766–770.

Although a plaintiff has the right to assume that the city had performed its duty in keeping a sidewalk in safe condition, and although he is not required to anticipate danger, yet if in passing over a sidewalk he fails to exercise ordinary care he is not entitled to recover, and a judgment for a municipality will be affirmed in the absence of such ordinary care.

So, where a hole in a sidewalk was half way between two gas lamps, and not farther than 80 feet from each, and the plaintiff, who had no knowledge of its existence, walked into the hole without noticing it, the court said:

"These lamps, presumably, were burning when the accident occurred. They are usually lighted at night, and one of the plaintiff's witnesses says he thinks they were burning, and there is no evidence that they were not. * * * Indeed the plaintiff himself testifies that a man could have seen the sidewalk, the night of the accident, if he had looked at it. He does say he did not see it, but gives no reason why he did not. *Had he looked, as he ought to have done*, or, *in other words, had he exercised ordinary care—he would have seen not only the sidewalk, but the hole therein in time to have avoided the accident*" (Moore *v.* City of Richmond, 85 Va., 538, 543, 545).

If an analogous case to the one at bar is required it can be found in Dubois *v.* City of Kingston, 102 N. Y., 219. In that case the plaintiff while running at night to a fire in the direction of his own house fell over a carriage step and was injured. The court, at page 224, said:

"It may also be remarked that the evidence of the plaintiff tended strictly to show that he was chargeable with negligence which contributed to the injury. There was abundant room for him to pass by the stepping stone without running against it. A very small portion of the end of the stone upon which he fell obstructed the sidewalk, and being well acquainted with the locality *had he been careful in exercising his faculties he could have avoided the accident.*"

In a like recent case, *where the plaintiff was walking rapidly and was injured by falling over a carriage step*, the court said:

"It is true that the plaintiff was injured, but that was the result of an accident, due possibly to his own fault."

Robert *v.* Powell, 168 N. Y., 415.

Where a traveler riding with another as his guest on a dark night, along an unlighted street, with an equal opportunity to discover and avoid danger and with equal knowledge that they were driving at a reckless speed, is injured by collision with a water hydrant at its proper place in the street he is guilty of such negligence as precludes a recovery against the city (City of Vincennes *v.* Thuis (Indiana), 63 N. E. Rep., 315, 317).

Counsel for the plaintiff in error relied in the court below on sections 232, 233, and 234 of the R. S. U. S. relating to the D. C., which read as follows:

"SEC. 232. The avenue and street lamps in the city of Washington shall be kept lighted with six-feet burners twenty-one nights in each month from dark until daylight.

"SEC. 233. The proper authorities are directed to increase from time to time, as the public good may require, the number of street lamps on any of the streets, lanes, alleys, public ways, and grounds, in the city of Washington, and to do any and all things pertaining to the well lighting of the city, and to levy and collect a tax from the property-holders sufficient to defray the expenses thereof.

"SEC. 234. In event of the failure of the proper authorities to levy and collect the tax or to light the city as directed by the two preceding sections, the Secretary of the Interior shall levy and collect such tax sufficient to light the city and to fully execute the provisions of the two preceding sections."

The claim was that these provisions cast a duty upon the District authorities to light the place where this stone lay. It is sufficient to note, we think, that the corporation of Washington was authorized by these sections to levy a tax upon the property-holders sufficient to pay for lamp-lighting. No such authority existed at the time of the accident to the plaintiff in error. Since the act providing for a permanent form of government for the District of Columbia, approved June 11, 1878, the Commissioners are directed "to apply the taxes and other revenues of said District to the payment of the current expenses thereof; to the support of the public schools, the fire department and the police."

The Commissioners are also required at the end of each fiscal year to submit to the Secretary of the Treasury a "statement showing detail of the work proposed to be done

by them during the fiscal year next ensuing and the estimated costs thereof."

The Secretary of the Treasury is required to consider these estimates and approve or disapprove them, and the whole is to be transmitted to Congress.

The act also provides:

"To the extent to which Congress shall approve said estimates, Congress shall appropriate the amount of fifty per centum thereof, and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia."

Since the above-mentioned act Congress has, each year, provided specifically for gas-lighting in the District of Columbia, and has changed and fixed the rates of payment of the public service corporation, which has a monopoly of the gas franchise in the District of Columbia.

It is submitted that whatever the Commissioners have done or may do in locating lamps is a matter of administration for which the municipality is not to be held responsible respecting any omission of duty on the part of its officers.

On the whole case, we submit that there is no error in the record, and that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

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